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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re Adam C., a Person Coming
Under the Juvenile Court Law.

B288359

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. CK53098)

Plaintiff and Appellant,

v.

R.R.,

Defendant and Appellant.

APPEALS from orders of the Superior Court of Los Angeles County, Lisa R. Jaskol, Judge. Affirmed.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine Miles, Assistant County Counsel, and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Appellant Department of Children and Family Services.

R.R. (Mother) appeals from the dependency court's dispositional order denying her request for custody of her son Adam C., and the order denying her reunification services. The Department of Children and Family Services (DCFS) cross-appeals from the dependency court's jurisdiction order dismissing the Welfare and Institutions Code section 300, subdivision (b)¹ allegation against Mother. As we explain, both parties' contentions lack merit, and accordingly, we affirm.

BACKGROUND

A. Family Background and Prior Dependency Proceedings

The family in this matter includes Mother, A.H. (Father), Adam C. (born in 2005), and his two older brothers, Ab.H. (born in 2000), and An.H. (born in 2002).²

For more than 15 years, the family has been involved in the child welfare system. In August 2003, DCFS initiated a dependency action on behalf Ab.H. and An.H., under section 300, subdivisions (a) and (b), based on allegations of domestic violence between the parents and Mother's inappropriate physical discipline of Ab.H. The court sustained the allegations, removed the children from parental custody, and provided reunification services, but the parents failed to reunify, and services were terminated. Although the court scheduled a hearing under section 366.26 to select and implement a permanent plan for the out-of-home care for the children, they eventually returned to the parents' custody, and in February 2006, the court terminated its jurisdiction.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Father and Adam C.'s brothers are not parties to this appeal.

In May 2008, DCFS initiated another dependency action under section 300, subdivisions (a), (b) and (j) alleging that the parents physically abused the older two children and that the parents engaged in domestic violence. The court sustained the petition, removed the children from parental custody, and ordered reunification services. In July 2009, however, the children were returned to the parents' custody.

Two months later, DCFS filed a section 342 supplemental petition on behalf of the children based on allegations that Mother had tested positive for methamphetamine. The court detained the children from Mother and sustained the drug use allegations. In October 2009, the juvenile court ordered Mother to enroll in drug counseling, classes and programs, and to participate in random weekly drug testing and aftercare. Mother was also granted monitored visits. In November 2009, Los Angeles County transferred the matter to Riverside County after the family relocated there. Father complied with the case plan, but Mother did not. In May 2010, the Riverside County dependency court terminated its jurisdiction. In the exit order, the court granted Father sole custody of the children and limited Mother's contact with the children to monitored visits.

At some point thereafter, the family returned to Los Angeles County, and in September 2014, DCFS substantiated a neglect allegation against Father because he had allowed Mother to live with the family and have unmonitored access to the children in violation of the exit order in the prior dependency case. DCFS offered the family services, but they refused to participate.

B. *Current Proceedings*

On December 28, 2016, DCFS received an anonymous referral alleging that the parents sold methamphetamine, supplied marijuana to Adam C.'s older brothers and that they used drugs in the children's presence. The DCFS worker met the family at the motel, where they were living at the time, and interviewed the parents, and the children all of whom denied the allegations. A week later, however, in early January 2017, Mother tested positive for alcohol and Father tested positive for methamphetamine and amphetamine. In mid-February 2017, DCFS obtained a removal order for all three children.

The parents were uncooperative; they refused services, failed to attend a meeting with the emergency-response worker and left the motel without notifying DCFS or leaving a forwarding address.

On February 28, 2017, DCFS filed a section 300 petition on behalf of then-11-year-old Adam C.,³ alleging under subdivision (b) that Mother had a history of substance abuse, including methamphetamine and amphetamine use, and she was a current abuser of alcohol; on January 6, 2017, the Mother had a positive toxicology screen for alcohol; the child was a prior dependent due to the Mother's substance abuse; and Mother's substance abuse endangered the child's physical safety and placed the child at risk of serious physical harm and damage. The petition contained a similar allegation under section 300, subdivision (b) against Father based on his positive tests and use of methamphetamine and amphetamine. At the February 28, 2017 detention hearing, the court found that there was a prima facie case

³ Ab.H. and An.H. were not included in the dependency petition because at the time they were both on probation and under the jurisdiction of the San Gabriel Valley Juvenile Probation Department.

that Adam C. was a person described by section 300 and ordered him detained in foster care. The court ordered DCFS to provide random and on-demand testing referrals for the parents⁴ and granted them monitored visitation.

In early March 2017, Father tested positive for methamphetamine and amphetamine, but Mother did not appear for the drug test. The parents visited Adam C. weekly and maintained phone contact with him.

The jurisdiction/disposition report disclosed that Adam C. and the parents continued to deny the parents used drugs. Mother stated that the alcohol test that yielded a positive result was inaccurate—she claimed that she tested positive for high glucose, not alcohol. Although she admitted that the children had been removed from her custody in 2009 for her methamphetamine use, she claimed that she had not used methamphetamine for 10 years. The report indicated that Mother had missed all subsequent drug/alcohol tests DCFS had requested; Mother explained she had not tested because the court had not ordered her to do so and she believed DCFS was not going to offer her family reunification services, and thus, she would not comply with DCFS's recommendations.

The jurisdictional report also revealed that Adam C.'s school principal reported that she suspected that Mother might be using drugs because she had seen Mother's "decline." A police detective also expressed suspicions that both parents were using drugs, noting that Mother was "slurring" her words when she spoke. The mental health assessor from the Multidisciplinary Assessment Team (MAT) stated the parents "appeared really out of it." The assessor described Mother's demeanor as "fidgety" and indicated

⁴ The court ordered DCFS to provide drug test referrals, but the court did not expressly order Mother to drug test.

that the parents left the assessment without finishing it. A paternal aunt said she stayed away from the family because she did not want their lifestyle to affect her family. She refused to elaborate but said the parents were in denial about their behavior. DCFS recommended no reunification services for Mother because she previously had lost custody of the children due to her substance abuse.

1. *Adjudication hearing*

At the adjudication hearing, Mother testified she had been diagnosed with type 2 diabetes in July 2017 and that before the diagnosis, she was not taking any medications. She denied drinking alcohol despite the January 2017 positive drug test. Mother believed her untreated diabetes caused the positive test for alcohol. Mother stated that she did not drug test for DCFS because she did not want to give them a false positive.

She admitted that she previously used methamphetamine in 2008, during the prior dependency case, and that the dependency court in Riverside County ordered her to participate in programs and treatment. She claimed that she had taken parenting classes, domestic violence counseling, and participated in treatment for substance abuse, but also conceded that she did not comply with the court-ordered drug testing and never provided proof of completing programs and treatment. Mother explained that she slurred her words because she was missing teeth. Mother also presented evidence from a medical expert, who testified that Mother's prior positive test for alcohol was not reliable.

DCFS argued that even though Mother's positive test result for alcohol may not have been reliable, other corroborating evidence indicated she had a substance abuse problem.

Mother's counsel asked the court to dismiss the allegation against Mother, pointing out that the parents and children denied

that Mother abused alcohol or drugs, that Mother's history of drug use was remote and she had no prior history of alcohol abuse. Counsel pointed out that none of the individuals who DCFS had interviewed—the detective, school personnel, or mental health assessor—ever observed Mother consuming drugs or alcohol or under the influence. As for the missed drug tests, counsel stated it was Mother's prerogative whether or not to attend, as drug testing was not court-ordered.

The court found that DCFS had not met its burden as to Mother. The court acknowledged that it was a tough case, but found that Mother's behavior could have been caused by her untreated diabetes and not necessarily substance abuse. The court also noted the one positive test result was unreliable and observed that witnesses' statements about Mother's appearance and behavior were not credible because they were based on speculation, and thus, insufficient to support a finding of current risk to the child under section 300. The court sustained the section 300, subdivision (b) allegation as to Father and dismissed the count relating to Mother.

Mother's counsel asked the juvenile court to release Adam C. to Mother's custody under section 361.2 as she was a nonoffending, noncustodial parent. Instead, because the court continued to have concerns about Mother's behavior during the proceedings and her failure to drug test at DCFS's request, the court continued the disposition hearing to give Mother the opportunity to submit to a hair follicle drug/alcohol test and Mother agreed to submit to the test.

2. *Disposition hearing*

On January 24, 2018, the court held the disposition hearing. DCFS informed the court that Mother had failed to submit to the agreed upon hair follicle test. The court declared Adam C. a dependent under section 300, subdivision (b), removed him from

Father's parental custody, ordered DCFS to provide reunification services for Father. The court considered and denied Mother's request for custody and placement under section 361.2. The court observed that it had given Mother the opportunity to drug test to show she had addressed the issues of concern and that Mother had agreed, but she failed to submit to the hair follicle test. The court also denied Mother reunification services based on Mother's failure to reunify with her children in the prior case and lack of any attempt to show rehabilitation.

Mother timely filed a notice of appeal, challenging the disposition order and denial of reunification services. DCFS timely cross-appealed the order dismissing the section 300, subdivision (b) allegation as to Mother.

DISCUSSION

A. *The Jurisdictional Order*

At a jurisdictional hearing, the dependency court determines whether the allegations in the petition that the minor comes within section 300 (and therefore within the juvenile court's jurisdiction) are true based on a preponderance of the evidence. (See § 355.) Section 300, subdivision (b)(1) describes in pertinent part a "child [who] has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the . . . inability of the parent or guardian to provide regular care for the child due to the parent's . . . substance abuse." (§ 300, subd. (b).)

We review the dependency court's jurisdictional findings under the substantial evidence standard of review, considering whether there is sufficient evidence, whether contradicted or not, that supports the position of the trier of fact. In making that determination, this court accepts as true the evidence supporting the trial court's determination taking into account all inferences

which might reasonably have been drawn by the trial court. We do not exercise independent judgment, reweigh evidence, or determine the credibility of the witness; this court resolves all conflicts in the evidence in favor of the trial court's decision. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193; *In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.) Thus, if supported by substantial evidence, the judgment or finding must be upheld, even though substantial evidence may also exist that would support a contrary judgment and the dependency court might have reached a different conclusion had it determined the facts and weighed credibility differently. (See *In re Dakota H.* (2005) 132 Cal.App.4th 212, 228 [the pertinent inquiry is whether substantial evidence supports the finding, not whether a contrary finding might have been made].)

Here, DCFS contends that substantial evidence did not support the dependency court's decision to dismiss the allegation under section 300, subdivision (b) against Mother. DCFS argues that even though Mother's positive alcohol test was unreliable, other circumstantial evidence existed in the record from which the court could infer that Mother had a current substance abuse problem, which posed a risk to Adam C. DCFS complains the dependency court ignored sufficient evidence of Mother's failure to drug test during these proceedings, her history of drug use and the statements of witnesses who suspected that Mother was currently using drugs. According to DCFS, it met the burden of proof under section 300, subdivision (b) and the dependency court erred in finding otherwise.

Although the evidence could have supported a determination sustaining the allegation against Mother, it does not appear that the trial court's findings and conclusions to the contrary exceeded the bounds of reason. As the record reveals, at the adjudication hearing, the dependency court considered all of the evidence then before it. The court noted that Mother had not been ordered to

drug test in this case, found that her prior drug use was remote and evaluated DCFS's witnesses' statements. The court did not err in rejecting the witnesses' speculation that Mother's behavior was caused by drug use. The court found Mother's explanation of her conduct and circumstances to be credible. As the court observed, at the time DCFS's witnesses observed Mother she was suffering from untreated diabetes and was missing teeth, which the court credited as the possible cause of Mother's strange behavior, slurred speech, and declining appearance. The court also observed Mother's demeanor and her testimony at the adjudication hearing. Thus, the court evaluated and weighed the evidence presented by DCFS against Mother's evidence and credited Mother's view. The court did not err making these assessments of this evidence. Given the standard of appellate review, requiring we resolve all conflicts in the evidence in favor of the judgment and that we do not reweigh the evidence, the court's determination must be upheld. (See *In re Sheila B.* (1993) 19 Cal.App.4th 187, 199–200 [affirming the dismissal of dependency petition at jurisdiction hearing and observing that “[a]bsent indisputable evidence of abuse—evidence no reasonable trier of fact could have rejected—we must therefore affirm the juvenile court’s determination”].)

B. *The Dispositional Orders*

Mother claims the juvenile court incorrectly identified her as a noncustodial parent and thereby applied the incorrect legal statute to determine Adam C.'s disposition. She further claims that sufficient evidence did not support the order denying her request for custody, and also argues the court erred in denying her reunification services.

1. *Mother has not demonstrated that the court applied the wrong statute in denying her custody request*

On appeal, Mother contends the juvenile court's disposition order must be reversed. She claims that because she lived with Adam C. when the dependency proceedings began she was a "custodial" parent, and therefore, the court should have applied section 361, subdivision (c), rather than section 361.2 in deciding her custody request at the disposition.

Preliminarily, we observe that when Mother requested custody of Adam C., she urged the court to proceed under section 361.2. Regardless of whether we view the issue as forfeited because Mother failed to request placement under section 361, or as an invited error because she requested placement specifically under section 361.2, the issue is not cognizable on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) Although in certain instances it may be appropriate to forego application of the forfeiture rule, we decline to do so in instances such as this where the party who now challenges the application of that very code section made a specific request for its application. (*Ibid.*)

In any event, Mother's argument that the court should have proceeded under section 361, subdivision (c) is unconvincing. Section 361 authorizes the removal of a minor from the physical custodial parent.⁵ (See § 361.) Although Mother resided with

⁵ Section 361, subdivision (c) provides that "[a] dependent child shall not be taken from the physical custody of his or her parents, guardian or guardians . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the following circumstances listed in paragraphs (1) to (5), inclusive . . . [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being

Adam C. when the petition was filed, she was not a “custodial parent.” (See *In re Terry H.* (1994) 27 Cal.App.4th 1847, 1856.) Custody and residence are not necessarily synonymous in this context. “Custody” here means the right of a parent to have physical possession of and/or the right to make decisions about the child, meaning that the parent has the right to exclude all others when making decisions about his or her child. (See *In re Austin P.* (2004) 118 Cal.App.4th 1124, 1130.) When the petition was filed in this case, Father was the sole legal and physical custodian of the minors; in 2010, Mother lost her custodial rights and never regained them. Mother has cited no authority, nor have we found any, to support the notion that a parent regains legal or physical custodial rights simply by residing with a child. Given Mother’s status as a noncustodial parent, the court did not err in failing to proceed under section 361 at the disposition.

Moreover, we reject Mother’s complaint that the court erred in applying section 361.2 at the disposition. Admittedly she lived with Adam C. in violation of the court’s order in the prior dependency case. Thus, Mother created the circumstance which appears to make section 361.2 inapplicable.⁶ Because she defied the court’s order in the prior dependency case, in our view, she is not entitled to any benefits that a custodial parent would have in this situation.

of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s, guardian’s . . . physical custody.” (§ 361, subd. (c).)

⁶ Section 361.2 governs custody requests made by noncustodial parents who do not reside with the child at the time the events arose that brought the child within the provisions of section 300. (See § 361.2, subd. (a).)

2. *Substantial evidence supported the court's disposition order*

Under any legal standard governing the disposition, the evidence regarding Mother's conduct and the risk it posed to Adam C. was sufficient to justify the decision not to place the child in Mother's care.

The court's disposition order is reviewed on appeal for substantial evidence. (*In re Hailey T.* (2012) 212 Cal.App.4th 139, 146.) As discussed earlier, under this standard, it is presumed the record contains evidence sufficient to support the judgment, and it is the appellant's burden to demonstrate otherwise. (*In re Matthew S.*, *supra*, 201 Cal.App.3d at p. 321.) Also, when making disposition orders, the juvenile court is not limited to the allegations of the sustained petition; rather, the court may consider all evidence on the question of the proper disposition. (§ 358, subds. (a) & (b); *In re Rodger H.* (1991) 228 Cal.App.3d 1174, 1183.)

At the disposition hearing, the evidence showed that Mother had lost custody of all three of her children in 2010 based on sustained allegations that Mother abused drugs. The evidence also showed that Mother did not comply with the case plan or the court-ordered drug testing in that matter, and that she lived with the children in violation of the court's order. Because there was some doubt about the veracity of her positive alcohol test and the quality of witness evidence that she was observed drunk or under the influence of drugs, the court delayed the disposition to give Mother a chance to do alcohol and drug testing—to provide evidence she was not currently using illicit drugs or abusing alcohol. Mother, however, failed to follow through on the court's order, substantiating the evidence of alcohol or drug abuse earlier presented.

In light of the considerable deference we give to the juvenile court's findings, on this record substantial evidence supports the court's refusal to place Adam C. in Mother's custody.

3. *The court did not err in denying Mother family reunification services*

Mother argues the juvenile court erred in denying her reunification services. We disagree.

Under section 361.5, a parent⁷ is entitled to receive reunification services unless the case is within one of the enumerated exceptions in section 361.5, subdivision (b). (§ 361.5, subd. (b).) Under section 361.5, subdivision (b), a court may deny services if it finds by clear and convincing evidence that a court previously terminated reunification services for any siblings because the parent failed to reunify with the siblings after the siblings had been removed from that parent. (§ 361.5, subd. (b)(10).) Section 361.5, subdivision (b)(10) has two prongs: (1) the parent previously failed to reunify with a sibling of the child; and (2) the parent failed to make reasonable efforts to correct the problem that led to the sibling being removed from the parent's custody. (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 95–96.) An order denying reunification services is reviewed for substantial evidence. (*Id.* at p. 96.)

In the present matter, Mother concedes that the first prong of section 361.5, subdivision (b)(10) exception has been met—Adam C.'s siblings were removed from parental custody in 2010 because of her substance abuse problem and she failed to reunify

⁷ Section 361.5 governs the provision of reunification services for parents whose children are removed from their custody under section 361, and here, for a noncustodial parent who has sought but was denied custody of the child under section 361.2, subdivision (b). (*In re Adrianna P.* (2008) 166 Cal.App.4th 44, 53–54.)

with them. Mother contends, however, that she made reasonable efforts to correct the problem which led to their removal in the prior case. She points out that she was found to be a nonoffending parent in this case and that DCFS did not present evidence she was currently using drugs.

Applying the standard of review on appeal, we conclude that substantial evidence supported the juvenile court's order. Concerning the current case, although the court concluded that DCFS failed to carry its burden of proof on allegations in the petition, the court did not find that Mother had resolved her prior substance abuse problems or that Mother no longer used drugs or alcohol. Even as the court dismissed the jurisdiction allegation against Mother, it expressed concerns about Mother's current conduct. In addition, in spite of Mother's claim that she had completed court-ordered programs to treat her prior substance abuse problems, the record contains no evidence to substantiate that claim. Because there was no evidence that Mother made any reasonable efforts to correct the problems that led to the removal of her children in the prior case, the dependency court did not err in denying Mother reunification services under section 361.5, subdivision (b)(10).

DISPOSITION

The orders of the dependency court are affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.